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No. 93-1543

In The

Supreme Court of the United States

October Term, 1994

CHRISTINE McKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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65 pp

QUESTION PRESENTED

Whether the lower courts properly denied Petitioner any remedy given her admittedly serious misconduct, her concession that the doctrine of after-acquired evidence of wrongdoing applies to the facts of her case, and her inability to adduce any evidence of pretext.

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STATEMENT OF THE CASE

A. The Proceedings Below[1]

On May 6, 1991, Petitioner filed suit in the United States District Court for the Middle District of Tennessee alleging that her discharge from employment with Respondent the Nashville Banner Publishing Co. ("the Banner")[2] violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101.[3] (J.A. 5a). After Petitioner's responses to the Banner's requests for documents and Petitioner's deposition revealed that she had stolen proprietary and confidential documents from the Banner during her employment as a confidential secretary for the Banner's Comptroller, the Banner moved for summary judgment. (J.A. 17a). The grounds for the motion for summary judgment ("Motion") were that Petitioner's admission of theft and of its inevitable consequences left no genuine disputes of material fact. Specifically, the Motion posited that Petitioner's admission that she could and would have been discharged had the Banner known

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1. For the sake of clarity, Respondent's Brief incorporates the following abbreviations in its citation of documents: "AFL.Br." = Amicus Brief of AFL-CIO; "Br.Op." = Brief in Opposition to Petition for a Writ of Certiorari; "Dock." = Docket; "EEOC Br." = Amicus Brief of EEOC; "J.A." = Joint Appendix; "NELA Br." = Amicus Brief of NELA & ATLA; "Pet." = Petition for a Writ of Certiorari; "P.A." = Petitioner's Appendix; "P.Br." = Petitioner's Brief on the Merits; "P.Dep." = Petitioner's Deposition.

2. The Banner is a closely held private corporation, with no parent or subsidiary company, in the business of publishing a daily newspaper known as the *Nashville Banner*.

3. Analysis of Petitioner's age discrimination claim under Tenn. Code Ann. § 4-21-101 is the same as under the ADEA. *Trentham v. K-Mart Corp.*, 806 F. Supp. 692 (E.D. Tenn. 1991), *aff'd*, 952 F. 2d 403 (6th Cir. 1992).

of the theft, confirmed by the undisputed testimony of four of the Banner's principals, precluded Petitioner from any relief under the doctrine of after-acquired evidence of wrongdoing ("the doctrine"). (J.A. 18a-43a).

Petitioner sought and was granted an extension of time to respond to the Banner's Motion. (Dock. 12). Both before and during that time, Petitioner conducted discovery, including taking the depositions of the four Banner principals.[4]

After this discovery, Petitioner opposed the Banner's Motion by arguing that summary judgment should be denied because her wrongdoing was not serious enough to warrant termination.[5] (J.A. 44a). The district court granted the Banner's Motion, finding that the undisputed facts revealed that the nature and materiality of Petitioner's misconduct provided "adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge." (P.A. 17a).

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that, based on the facts of this case, the district court properly granted summary judgment. (P.A. 2a). Specifically, the Sixth Circuit relied on *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and two prior

4. Specifically, Petitioner's counsel deposed Irby C. Simpkins, Jr., President of the Banner and Publisher of the *Nashville Banner;* Edward F. Jones, Editor of the *Nashville Banner;* Imogene Stoneking, Comptroller of the Banner and Petitioner's direct supervisor; and Elise D. McMillan, General Counsel and Executive Vice President of the Banner.

5. Petitioner misstates the Banner's position regarding this issue. She states that the Banner "acknowledges" that there was a factual dispute about the gravity of her wrongdoing. (P.Br. at 6, 43). Contrary to this assertion, there never was a genuine dispute of material fact over the seriousness or consequences of her misconduct. *See* Counter Statement of the Facts, *infra*.

Sixth Circuit cases[6] to hold that the doctrine applied to Petitioner's misconduct during her employment. (P.A. 4-8a). The Sixth Circuit specifically rejected Petitioner's argument that she was justified in having a "lever with which to resist" a possible discharge (P.A. 8a), noting that adoption of this theory would justify an employee's taking money from her employer to support herself in anticipation of unlawful discharge. (P.A. 9a).

In her Petition, Petitioner conceded the applicability of the doctrine but asked this Court to select the Eleventh Circuit's approach to the remedies available under the doctrine. (Pet. at 11). Now, Petitioner asks that the doctrine be modified to give her a jury trial on all issues and, for the first time, asks this Court to decide whether the doctrine may be used to limit compensatory damages for alleged retirement harassment or to bar back pay for "discrimination in compensation."[7] (*See* P.Br. at 3, 8, 12, and 50).

B. Counter Statement of the Facts

In deciding the Motion, the district court viewed the facts in the light most favorable to Petitioner. Petitioner, in her statement of the facts in the Petition and in her brief on the merits, attempts to recast the facts as developed in the record. By omitting many material facts developed in the proceedings below and misstating other facts that are relevant to the disposition of this appeal, Petitioner has distorted the record. Accordingly, the Banner presents the facts as developed on the record.

6. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993); *Johnson v. Honeywell Info. Sys. Inc.*, 955 F.2d 409 (6th Cir. 1992).

7. Because Petitioner failed to raise these matters below, they are barred by waiver. *See* I., *infra*.

Petitioner, an at-will employee, was one of nine employees laid off October 31, 1990, as part of a reduction in force the Banner instituted for financial reasons.[8] (J.A. 13a, 57a). From March, 1989, through October 31, 1990, Petitioner held the position of secretary to Imogene Stoneking, the Banner's Comptroller.[9] (J.A. 5a). Petitioner's duties in this position included maintaining personnel files, assisting in the preparation of the Banner's annual budget, processing time sheets, and doing various other tasks assigned to her by Ms. Stoneking. (J.A. 5a).

As secretary to the Comptroller, Petitioner had access to confidential documents and information, including payroll data, financial information, personnel files, and other confidential records. (Dock. 8). In her deposition, Petitioner admitted that she understood that all of this information was confidential and proprietary business information. (J.A. 132-33a). Petitioner also admitted that she understood that the Banner was relying upon her to safeguard the confidentiality of the business and proprietary information to which she had access as the Comptroller's secretary.[10] (J.A. 132-33a). She further admitted knowing that she

8. Petitioner concedes that she was aware of the Banner's financial difficulty (Pet. at 4) but, in her brief on the merits, adds an incorrect gloss when she states that the Banner "repeatedly admonished Petitioner to retire," implying that the question of Petitioner's retirement came up more than once. (P.Br. at 3). In her deposition, however, Petitioner clarified that Petitioner was asked about her retirement plans once, and only once. (II P. Dep. at 62).

9. Contrary to her statement, Petitioner was not employed by the Nashville Banner Publishing Co. since May, 1951, but was employed by the Respondent in this case only since 1971. (J.A. 120a).

10. As the following deposition exchange demonstrates, Petitioner fully understood that her job dictated utmost confidentiality and trust:

> A. You had to see confidential information when you worked for the comptroller.
>
> Q. That was part of your job? A. That was part of my job.
>
> Q. And you understood that was confidential information? A. I certainly did. I was a very confidential secretary. That's probably why — I was discreet; I was very confidential.
>
> Q. And you understood your job required you to be confidential? A. That's right.
>
> Q. Did you also understand that you should treat the information that you dealt with in connection in working for Ms. Stoneking as confidential? A. I did.
>
> Q. And you understood that was proprietary business information? A. I did.
>
> Q. You understood that it was not supposed to be disclosed? A. Yes.
>
> Q. And you understood it was not supposed to be disclosed outside of the work place and people who were not authorized to know at the company? A. Yes.
>
> Q. There wasn't any question about that in your mind, was there? A. I was a highly confidential secretary and discreet.
>
> Q. And if you had violated those confidences and disclosed confidential information that you received as a result of your position as a confidential secretary, did you understand that you could be disciplined or discharged for that? A. I never did that. I didn't have that problem. My reputation was confidential and discreet, so that was no problem.
>
> Q. But if you had done it, did you understand that you could have been discharged for that? A. I think anybody would have thought that.
>
> Q. So you agreed with that and you understood that then? A. Yes.
>
> Q. And the company had the right to rely upon you not to disclose that information? A. Yes.

(J.A. 117a-118a).

was to keep this information strictly confidential and that the

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failure to do so could and would result in termination.[11] (J.A. 153-54a).

Thus, Petitioner knew that she held a position of trust with the Banner and understood her obligation to maintain the confidentiality of the information to which she was privy. Nevertheless, Petitioner admitted that she surreptitiously photocopied and removed from the Banner's premises sensitive financial documents and personnel records.

Specifically, the Banner discovered during Petitioner's deposition that, before she was laid off, Petitioner had copied the Nashville Banner Fiscal Period Payroll Ledger listing salaries and related information about the Banner's owners, management personnel, and administrative staff.[12] (J.A. 141-54a). She also copied the Nashville Banner Publishing Co.'s 1989 Profit and Loss Statement. (*Id.*).

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11. "Well, I would know that I'd be terminated had I told anybody, but I did not tell anybody. They [the documents] were safe with me." (J.A. at 153a). "*I understood that if I showed these documents to anybody, I would have been terminated.* But they were safe." (J.A. at 154a) (emphasis added).

12. Petitioner divulged to her husband and attorney confidential and proprietary salary information concerning the following individuals: Irby C. Simpkins, Jr., President of the Banner and Publisher of the *Nashville Banner;* Brownlee Currey, Chairman of the Board of the Banner; Elise D. McMillan, the Banner's General Counsel and Executive Vice President for Administration; Imogene Stoneking, Comptroller of the Banner; Edward F. Jones, Editor of the *Nashville Banner;* Jack Gunter, Director of Special Projects; and various secretaries. (J.A. 141-54a).

Although Petitioner tries to understate the severity of her misconduct, the Banner was forced to obtain a protective order in the district court in order to safeguard the proprietary and confidential information that Petitioner had put at the unfettered disposal of herself and her husband. (Dock. 6).

Petitioner admitted that in copying these documents she intentionally disobeyed the Comptroller's specific instructions to shred them. (*Id.*). Instead, she photocopied the documents for her own use. (*Id.*). Knowing full well the highly confidential nature of these documents and her duty to maintain their confidentiality, Petitioner removed them from the Banner's premises and shared the information with her husband. (*Id.*). Because Petitioner knew that she was not authorized to take and use these documents for her own purposes, she copied and removed them secretly, not telling the Comptroller or anyone else at the Banner that she had copied these documents or that she was removing them from the premises. (*Id.*).

In addition to the documents she had been instructed to shred, Petitioner secretly copied and removed from the Banner's premises several documents contained in the personnel file of a Banner manager. (*Id.*). Among these documents was a confidential agreement entered into between the Banner and the manager and a series of documents relating to that agreement. (*Id.*). Petitioner admitted that she understood she was not authorized to copy any of these documents, much less to remove them from the Banner's premises and share the contents with anyone. (*Id.*).

The first time the Banner became aware that Petitioner had secretly copied, removed, and shared confidential financial and personnel documents was during her deposition on December 18, 1991.[13] (J.A. 18-21). Petitioner testified that she took these documents without authorization from and without asking anyone at the Banner, that she had been instructed to shred two of the documents she copied, and that she understood that these actions could and would subject her to termination. (J.A. 141-54a). In her deposition, she testified that the reason she copied and removed the

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13. Petitioner produced these confidential and proprietary documents during discovery. The Banner did not know when, how, or why Petitioner obtained these documents until her deposition.

documents was for her "insurance" and "protection."[14] (J.A. 145, 150a).

As a result of the discovery of Petitioner's misconduct, the Banner informed her by letter that her actions constituted deliberate misconduct involving breach of trust and confidentiality obligations essential to her position as a confidential secretary. (J.A. 37a). In this letter, in his affidavit, and in his deposition, the Banner's President stated that had the Banner been aware of Petitioner's breach of trust and misconduct at the time that it occurred or at any time thereafter the Banner would have terminated her immediately. (J.A. 35a; 37a; 55a). Similarly, in affidavits and again in deposition testimony, every other member of the Banner's management involved in Petitioner's employment stated unequivocally under oath that they would have terminated or recommended termination of Petitioner.[15] (Dock. 8). Even though Petitioner's counsel conducted discovery and deposed each of these managers, she has not offered any rebuttal to their testimony.[16] (P.A. 17a).

14. After producing the stolen documents in an apparent attempt to collect on her "insurance," Petitioner was faced with the Banner's motion. In an affidavit filed three months after her deposition to resist the Banner's Motion, Petitioner decided that her intent in taking the documents was to gain information about her job security concerns. (J.A. 48a). Further, long after the time for submitting errata changes had lapsed, in an attempt to evade the consequences of her admitted misconduct in her deposition, Petitioner submitted 60 pages of errata changes to her deposition, changing many answers from *yes* to *no* and from *no* to *yes*. (J.A. 93a-102a). The Banner's objections to Petitioner's effort to recast the facts was mooted by the district court's grant of the Motion.

15. Notwithstanding Petitioner's effort to minimize the undisputed proof presented by the Banner as to the consequences of her breach of trust (*see* P.Br. at 5-6), the most that her series of negatives establishes is that, in the past five years, the Banner has been unaware that any other employees engaged in such egregious misconduct.

16. Petitioner betrays a misunderstanding of summary judgment (Cont'd)

SUMMARY OF ARGUMENT

Petitioner in this case is entitled to no relief under the doctrine, which has its genesis in other established legal and equitable rules.

First, Petitioner's claims for compensatory damages and backpay for alleged discrimination in compensation are barred by the ADEA and waiver. Second, petitioner concedes that the doctrine applies to her admitted and serious misconduct to limit other relief. Further, it is undisputed that she would have been fired for the misconduct had she not successfully concealed it. Thus, based on the undisputed facts of this case, summary judgment against Petitioner barring all relief was proper.

Third, the constitutional doctrine of standing along with her failure to establish a prima facie case and her admittedly unclean hands operates to bar Petitioner from any relief. Thus, based on established legal and equitable principles, the doctrine was properly applied to deny this ADEA Plaintiff any relief.

Finally, Petitioner's argument that she is due a remedy relies on inapplicable statutes and authorities. Thus, because Petitioner's authorities are inapposite, because there are no material disputed facts, and because the Banner fully met its burden of proving both objectively and subjectively that she would have been discharged, summary judgment was properly granted against Petitioner.

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procedure and of this Court's holding in *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), regarding burden of proof when she states that whether her dismissal was inevitable "clearly" would be a jury issue. (P.Br. at 6). *See* Part V, *infra*, and discussion in Part II of Respondent's Brief in Opposition at 18-20.

ARGUMENT

The issue in this case is whether Petitioner's admittedly serious misconduct entitles her to a trial to seek money damages, even though it is undisputed that she received her full salary and benefits for over a year after she betrayed her employer's trust. Thus, even while admitting that she engaged in misconduct serious enough to warrant discharge, conceding that the doctrine applies to limit relief, and presenting no disputed material facts, Petitioner requests a trial to establish discrimination and to seek a panoply of relief, including compensatory damages and backpay for alleged discrimination in compensation. These requests are logically and legally untenable and should be rejected.

I.

PETITIONER'S CLAIMS FOR COMPENSATORY DAMAGES AND BACKPAY FOR ALLEGED DISCRIMINATORY COMPENSATION ARE BARRED.

Sensing that her claim for backpay is without merit, Petitioner now announces, for the first time in her brief on the merits, that she seeks compensatory damages for alleged retirement harassment and backpay for alleged "discrimination in compensation." Other than in her complaint, nothing in the record ever mentions these claims, and Petitioner has pointed to no record support. These specific requests for relief are barred by waiver and under the ADEA.

First, the ADEA does not provide for compensatory damages. *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 583 n. 11 (1978). Thus, on this ground alone, Petitioner's claim for compensatory damages is barred.

Second, Petitioner's claims for compensatory damages for

alleged harassment and backpay for alleged discrimination in compensation have been waived. Because Petitioner did not raise these claims earlier, neither the district court nor the Sixth Circuit addressed these claims. Further, they are not supported by arguments in the record and were not included in her Petition. Thus, because Petitioner waived these claims, they are not properly before this Court. *See Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("this Court does not decide questions not raised or resolved in the lower courts"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976)(per curiam)(same); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.5 (1989)(same); *see also Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 277 (1989) (failure to raise argument before either of lower courts and failure to make specific mention of it in petition bar consideration).

Accordingly, Petitioner's belated claims for compensatory damages and backpay for alleged discrimination in compensation are barred.

II.

THE APPLICABILITY OF THE DOCTRINE TO PETITIONER'S MISCONDUCT IS NOT IN DISPUTE.

Petitioner concedes that the doctrine applies to her misconduct and admits that her misconduct was serious enough to warrant discharge. Nevertheless, Petitioner asks this Court to allow her a trial to seek the equitable remedy of backpay. The facts of this case fully justify barring any remedy to Petitioner.

A. The Circuits Considering the Doctrine Agree that Misconduct Limits Remedies.

Since the Tenth Circuit articulated the doctrine in *Summers*,

864 F.2d 700, the Sixth,[17] Seventh,[18] Eighth,[19] and Eleventh Circuits[20] have applied the doctrine either to bar or to limit relief in certain circumstances.[21] The rationale for barring any claimed remedy is that a plaintiff who engages in serious misconduct has suffered no injury caused by the employer. *Id.* 864 F.2d at 708. Adopting the reasoning of *Summers* that an employee's serious misconduct bars any claim to damages from the time of the misconduct forward, the Sixth Circuit held that summary judgment for the employer is proper where the employer can show that the nature and materiality of the wrongdoing would have led to immediate discharge. *Johnson*, 955 F.2d at 414; *see also O'Driscoll v. Hercules, Inc.*, 12 F.3d 176, 179 (10th Cir. 1994), *petition for cert. filed*, 62 USLW 3799 (U.S. Apr. 1, 1994) (No. 93-1728).

The Seventh and Eleventh Circuits agree that an employee's misconduct is relevant to the nature of a remedy in a subsequent

17. *Milligan-Jensen*, 975 F.2d 302; *Paglio v. Chagrin Valley Hunt Club Corp.*, 1992 U.S. App. Lexis 15,399 (6th Cir. 1992); *Dotson v. United States Postal Serv.*, 977 F. 2d 976 (6th. Cir.), *cert. denied*, 113 S.Ct. 263 (1992); *Johnson*, 955 F.2d 409.

18. *Smith v. General Scanning, Inc.*, 876 F.2d 1315, (7th Cir. 1989); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992); *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992); *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993).

19. *Welch v. Liberty Mach. Works*, 23 F.3d 1403 (8th Cir. 1994).

20. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992).

21. *Cf. Mardell v. Harleysville Life Ins.*, 1994 WL 396512 (3d Cir. 1994) (holding that separate trials necessary, one for liability and second for relief, and that doctrine relevant only at relief stage); *EEOC v. Farmer Bros. Co.*, 1994 U.S. App. Lexis 19788 (9th Cir. 1994) (refusing to reach merits of defense because raised for first time on appeal but observing that material employment application fraud could limit relief, depending on all facts and circumstances).

discrimination lawsuit. *See Kristufek*, 985 F.2d 364; *Wallace*, 968 F.2d 1174.

The Seventh Circuit — after holding that the doctrine applied on summary judgment to bar all relief in *Washington*, 969 F.2d at 256-57 — determined in *Kristufek* that a jury finding of retaliation and the employer's failure to prove it would have fired the plaintiff precluded a complete bar to backpay. *Kristufek*, 985 F.2d at 370. However, under the facts of the case before it, the court in *Kristufek* ordered a reduction in the jury's award of backpay for the time after the plaintiff's fraud was discovered. *Id.* at 371.

Two of the judges on the Eleventh Circuit panel in *Wallace* agreed that after-acquired evidence is relevant to the relief due a successful discrimination plaintiff in order to preserve an employer's rights to make decisions:

> A sufficient showing of after-acquired evidence mandates the drawing of a boundary between the preservation of the employer's lawful prerogatives and the restoration of the discrimination victim. To be sure, the boundary will vary depending on the facts of each case. Therefore, the effect of after-acquired evidence on Title VII remedies is best decided on a case-by-case basis.

968 F.2d at 1181 (footnote omitted).

Based on the facts before the court in *Wallace*,[22] the majority

22. Other circuits deciding that a bar to all relief was inappropriate reviewed factual scenarios involving direct evidence of discrimination, limited or immaterial application misrepresentations, and/or limited proof of the employer's actions in response to the fraud. *See, e.g., Mardell*, 1994 W.L. (Cont'd)

decided that reinstatement and front pay were inappropriate remedies because the plaintiff's application fraud gave the employer a legitimate reason to discharge the plaintiff. However, the court determined that "the boundary" between the employer's and employee's interests shifted to disallow the plaintiff's backpay period to terminate prematurely unless the employer were able to prove "that it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and this litigation." 968 F.2d at 1182.

The court in *Wallace* rejected the approach adopted in *Kristufek*, which was to end the backpay period at the time the employer actually discovered the wrongdoing. *Id.* Thus, the employer's motion for summary judgment in *Wallace* was denied because the employer had no evidence showing when it would have discovered the fact that the plaintiff had failed to reveal her criminal conviction.[23]

Notwithstanding the fact that Petitioner here concedes that the doctrine applies to her misconduct and admits that her misconduct was serious enough to warrant and would have led to discharge, she urges that she be allowed a trial and allowed to seek unlimited backpay under the formula fashioned by the court in *Wallace*. In short, Petitioner is asking this Court to force a trial on undisputed facts and to force the Banner to prove when it would have discovered her surreptitious copying and theft while she was

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396512 (direct evidence and single employer affidavit); *Kristufek*, 985 F.2d 364 (direct evidence and no proof that employer would have fired); *Welch*, 23 F.3d 1403 (direct evidence and single affidavit).

23. Defendant's petition for rehearing *en banc* has been pending in the *Wallace* case since September, 1992.

employed in order to foreclose her from seeking backpay. This position is untenable.[24]

B. The Facts and Proof in the Present Case Warrant a Bar to All Relief.

Petitioner's misconduct fully warrants a complete bar to any relief. While serving as confidential secretary to the Comptroller, she secretly copied confidential, proprietary information. Petitioner then removed the documents from the Banner's premises and shared the contents with at least her husband and attorney.

Petitioner admitted knowing that this information was to be kept strictly confidential and that her failure to do so could and would result in her termination. She also admitted that she intentionally disobeyed the Comptroller's specific instructions to shred some of the documents. Petitioner also testified under oath that she secretly copied and took confidential documents from a manager's personnel file, including information about the manager's salary and related matters. Petitioner did not have permission to take any of these documents.

Compounding the betrayal of trust is Petitioner's reason for her theft. In her deposition, she testified that she copied and stole the documents for "insurance" and "protection."[25] Her attorney

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24. As Petitioner's Reply Brief in support of the Petition concedes, under the facts of this case where Petitioner successfully concealed her theft until it suited her purposes to reveal it, the Banner's ability to prove exactly when Petitioner's theft would have come to light would be "highly dubious." It is undisputed that the documents were under Petitioner's and her husband's unfettered control. Thus, had Petitioner not produced the stolen documents during discovery, the Banner would likely not know to this day that she had betrayed her trust while serving as a confidential secretary.

25. Only after the Banner filed its Motion, did Petitioner try to alter her

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admitted in oral argument on the Banner's Motion that she stole the documents for insurance, and the district court rhetorically characterized her motive as blackmail. (Dock. 60, at 44). The district court found Petitioner's misconduct to be both undisputed and sufficiently gross to warrant application of the doctrine to bar all relief:

> The Court does not hold that any or all misconduct during employment constitutes just cause for dismissal or serves as a complete defense to a wrongful discharge action.The Court concludes, however, that Mrs. McKennon's misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge.

(P.A. 16a-17a).

The Sixth Circuit agreed that the doctrine was properly applied to bar relief in view of the nature and materiality of Petitioner's admitted wrongdoing and the undisputed proof that the Banner would have fired her for her betrayal of trust.

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testimony by creating a sham affidavit and offering wholesale changes to her deposition. In making these changes, Petitioner attempted to justify her misconduct by suggesting that her breach of trust was in response to her job-security concerns. (*See* J.A. 48a; 93a-114a). The district court properly rejected her after-the-fact rationalization for her misconduct as irrelevant. (P.A. 17a). Although Petitioner references this rationalization in her brief, she does concede that "some circumstances" would warrant rejection of the "devil-made-me-do-it" argument. (*See generally* P.Br. at 37).

The circuits applying the doctrine to bar relief have articulated a high standard of proof that employers must meet on a motion for summary judgment to show that a discrimination plaintiff is entitled to no relief. *See, e.g., Johnson,* 955 F.2d at 414 (the evidence must establish valid and legitimate reason for termination); *Wallace,* 968 F.2d at 1181 n.11 (employer bears burden of persuasion to show by preponderance of evidence whether and how misconduct would alter employment relationship); *Kristufek,* 985 F.2d at 370 (proof by a preponderance of evidence that employer would have fired the plaintiff); *O'Driscoll,* 12 F.3d at 179 (proof that misconduct would have justified discharge and that employer would have discharged the plaintiff); *Welch,* 23 F.3d at 1405 (single self-serving affidavit insufficient to meet employer's burden).

This articulation of the employer's proof boils down to a three-part test, which this Court should adopt for purposes of determining whether an employer should prevail on a motion for summary judgment:

(1) the undisputed material facts must establish serious wrongdoing related to employment;[26]

(2) the employer must show that the misconduct constitutes a valid and legitimate reason for discharge, *i.e.*, that discharge is objectively reasonable;[27] and

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26. Petitioner frets th... "imperfect employees" will be denied protection under the discrimination laws. (P.Br. at 22). In the present case, the gravity of Petitioner's misconduct is well beyond mere imperfection. Furthermore, the requirement that the conduct be serious and employment related erases the concern for "imperfect employees." Finally, Petitioner's claim that federal judges are incapable of making the distinction between minor and serious misconduct (P.Br. at 28, 47-48) defies reason and experience and is insulting to the federal judiciary.

27. Petitioner's discussion of "objective evidence" (P.Br. at 44-45)
(Cont'd)

(3) the employer must prove subjectively that it would have terminated the employee had the misconduct been discovered.[28]

The proof in the present case meets all three prongs. First, the material facts in the present case are undisputed. Petitioner testified that as a confidential secretary she was entrusted to safeguard her employer's confidential and proprietary information. She testified that she breached her employer's trust by copying and disclosing the information to unauthorized persons and that she breached that trust to serve her own purposes. Petitioner admitted that her misconduct was serious and job related and that she knew she could and would have been discharged had she been caught copying and removing this information. Therefore, the material undisputed facts establish conclusively the effect of her wrongdoing on her employment status.[29]

Second, in addition to Petitioner's understanding of the

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paradoxically boomerangs. Not only did Petitioner's counsel try and fail in depositions to show that Petitioner would not have been fired for her misconduct, but also Petitioner herself conceded that she would have been fired. Petitioner's question regarding assessment of the defense based on after-acquired evidence of wrongdoing is easily answered. What would have occurred had the Banner not discharged Petitioner, had harbored no "impermissible motive," and had known about her betrayal of trust is beyond cavil: she would have been fired on the spot.

28. This three-part test fully comports with Rule 56 of the Federal Rules of Civil Procedure and with this Court's articulation of an objective and subjective standard of proof in *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

29. Petitioner is uncertain as to where the effect of her misconduct, viz-a-viz the Sixth Circuit's embezzler hypothetical and an employee's denunciation of a supervisor who assaulted her, "falls." (P.Br. at 37-38). Neither the Banner nor any other reasonable employer would have any doubt that Petitioner's misconduct pegs the embezzler side of the continuum.

inevitable result of her actions, immediate discharge based on her breach of employment trust is objectively reasonable. Put simply, courts have agreed that some kinds of employee misconduct warrant immediate termination. *See, e.g., Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515, 521 (D. Kan. 1991) (reasonable employer in security service business would not have hired or would have terminated plaintiff after discovering true facts of her employment and personal history); *O'Driscoll*, 745 F. Supp. 656, 659 (D. Utah 1990), ("it simply strains credulity to accept that any reasonable management personnel would have done otherwise [terminated the plaintiff] had they known of her misrepresentations"), *aff'd*, 12 F.3d 176 (10th Cir. 1994). Thus, even if Petitioner had not conceded that her breach of trust would in fact have led to her immediate and justified discharge had she not successfully concealed her theft, there can be no dispute that any reasonable employer would have terminated an employee under the circumstances that the present case presents.[30]

Third, the evidence is undisputed that the Banner would in fact have discharged Petitioner. Immediately upon discovery of her theft, the Banner's President wrote to Petitioner that her misconduct was cause for immediate discharge. Moreover, affidavits submitted by four of the Banner's principals state that they would have discharged Petitioner or recommended her discharge had they known of her breach of trust. Finally, and contrary to Petitioner's implication that the Banner relied only on affidavits, after the Banner filed its Motion based on the letter and the affidavits, Petitioner sought and was granted an extension of time to conduct further discovery, including deposing all four of the Banner's principals. This discovery and these depositions merely confirmed the earlier evidence that Petitioner would have been terminated immediately upon discovery of her theft.

30. It goes without saying that if discharge is objectively reasonable, no reasonable jury would find otherwise.

This case contains no evidence of employer misconduct that has concerned some courts. *See, e.g., Johnson*, 955 F.2d at 414 (proof that employer would have discharged employee necessary to avoid after-the-fact rummaging through employees' personnel files to find trivial, non-material misconduct).[31] In the present case, the Banner had no knowledge of Petitioner's theft until she herself revealed it by gratuitously producing the stolen documents. The Banner had no knowledge that Petitioner had systematically copied and removed the documents for her "protection" and "insurance" until her deposition.

None of the "parade of horribles" hypothesized by the Eleventh Circuit in *Wallace* is present here. The court in *Wallace* believed that the doctrine "invites employers to establish ludicrously low thresholds for 'legitimate' termination" and to "'sandbag'" an employee by hiring a woman knowing reasons not to employ her, concealing the knowledge, discriminating against her, and "discovering" the concealed knowledge to defend against a discrimination lawsuit. *Wallace*, 968 F.2d at 1180-81. This hypothetical is neither reasonable nor realistic. For one thing, the three-part test articulated above fully protects against such hypothetical abuses. Second, the facts of the present case contain no evidence of such employer machinations and abuse.[32] Here,

31. Petitioner mistakenly attributes the masquerading physician hypothetical to *Johnson*. (P.Br. at 29 n.34). In fact, the court in *Summers* discussed the masquerading doctor hypothetical. *See* 864 F.2d at 708. The present case presents an analogous but non-hypothetical situation: the employee who masquerades as a confidential secretary.

32. The brief of the Women's Legal Defense Fund, *et al.*, misstates by omission the material facts in many of the cited cases by repeatedly minimizing both the misconduct of the alleged victims and the grounds for granting summary judgment. For example, by ignoring the subsequent history of *O'Driscoll*, 745 F. Supp. 656, *aff'd*, 12 F.3d 176 (10th Cir. 1994), the amici fail to note that the plaintiff's misdeeds included insurance fraud and a felony; the (Cont'd)

only Petitioner's skill at concealing her wrongdoing prevented the Banner from knowing about it until Petitioner chose to use the documents for her own purposes after the lawsuit was filed.[33]

Indeed, the hypothetical provided by the two judges in *Wallace* compels a flawed result. Petitioner highlights this flaw when she concedes that the doctrine properly bars reinstatement and front pay. Taken to its logical conclusion, the "sandbagging" hypothetical would prevent *any* application of the doctrine to limit relief. However, the two judges in *Wallace*, who believed that a complete bar to backpay was inappropriate, held that the doctrine was properly applied to deny reinstatement and front pay to the plaintiff, 968 F.2d at 1184,[34] a proposition that Petitioner concedes. (P.Br. 13, 50).

amici fail to include an independent ground for summary judgment that the court in *Rich v. Westland Printers*, 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993), describes as "meritorious" and "most persuasive"; and the amici ignore the fact that relief to the plaintiff in *Bonger v. American Water Works*, 789 F. Supp. 1102 (D. Colo. 1992), was also denied because of the plaintiff's unauthorized copying of confidential documents.

33. Petitioner herself engaged in sandbagging by withholding the documents in her EEOC charge. (J.A. 144a).

34. A second obvious flaw to the majority's position in *Wallace* is that expecting employers to prove when they would have discovered concealed misconduct is objectively untenable. Under this construct, employees who are skilled at covering up theft or fraud would be rewarded with backpay during the time of the employees' successful stealth. Conversely, employers that cannot establish a time certain when they would have discovered the concealed wrong would be punished for their inability to detect it. The present case presents just such a problem. *See* note 24, *supra*. To impose a burden of resolving when, if, and how a hypothetical discovery would have occurred is not warranted under the three-part test posited above or under the facts of this case.

III.

APPLICATION OF THE DOCTRINE TO BAR ALL RELIEF IN CERTAIN CIRCUMSTANCES SPRINGS FROM ESTABLISHED LEGAL AND EQUITABLE DOCTRINES.

Petitioner's reliance on other federal laws is misplaced, and her argument that the timing of discovery of her misconduct somehow warrants relief is contrary to established law. First, this lawsuit is brought under the ADEA, not any other federal compensatory law or the NLRA.[35] Beginning with passage of the ADEA and concluding most recently with the passage of the Civil Rights Act of 1991, Congress has treated the ADEA differently from even Title VII.[36] Second, the facts of the present case make the prospect of rewarding Petitioner with any monetary relief as unthinkable as allowing bank tellers who successfully embezzle to seek backpay and compensatory damages because their skills at

35. *See* discussion at IV, *infra*.

36. *See Age Discrimination in Employment: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 23-35 (1967); H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 14-15 (1991), *reprinted in* 1991 U.S.C.C.A.N. 552-53; H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 24 (1991), *reprinted in* 1991 U.S.C.C.A.N. 717; *Statement of President George Bush Upon Signing S. 1745*, 27 Weekly Compilation of Presidential Documents 1701 (Nov. 25, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768; H.R. Rep. No. 756, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5628; H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213; *Additional Views of Mr. Javits, Mr. Prouty, Mr. Murphy, and Mr. Griffin, reprinted in* 1966 U.S.C.C.A.N. 3045-47; *U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964* (1965); 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991)(remarks of Rep. Edwards); 137 Cong. Rec. S15,486 (daily ed. Oct. 30, 1991)(remarks of Sen. Kohl); 137 Cong. Rec. S15,233-35 (daily ed. Oct. 25, 1991)(remarks of Sen. Kennedy); 113 Cong. Rec. 31253-55 (1967)(remarks of Sen. Yarborough and Sen. Javits).

hiding their theft delayed or precluded discovery of the theft. As the following shows, the most basic principles of standing and the maxims of equity foreclose any relief to plaintiffs guilty of serious on-the-job misconduct who claim that they suffered subsequent employment discrimination.[37]

A. The Constitutional Doctrine of Standing Operates to Deny Plaintiffs Any Relief.

The first of these doctrines is the constitutional requirement of standing. *See Wallace*, 968 F.2d at 1185 (Godbold, J., dissenting); *Frey v. Ramsey County Community Human Servs.*, 517 N.W.2d 591, 598 (Minn. Ct. App. 1994).

"[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). To establish standing, a party must demonstrate three elements: (1) injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). "These elements are the 'irreducible minimum' ... required by the Constitution." *Northeastern Fla. Contractors v. City of Jacksonville*, 113 S. Ct. 2297, 2302 (1993) (quoting *Valley*

37. Although Petitioner relies on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), some courts and Petitioner's amici have criticized grounding the doctrine on the rationale behind the mixed-motive construct in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and its progeny. The court in *Summers* found the mixed-motive rationale a useful means of analysis, and other courts have been likewise persuaded. *See, e.g., Welch*, 23 F. 3d at 1405. *But see Wallace*, 968 F.2d at 1179-80. Regardless of whether this Court decides that the mixed-motive analysis is or is not a proper underpinning for the doctrine, other and older decisions by this Court provide clear precedent for barring all relief to some plaintiffs, such as Petitioner, claiming injury.

Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).[38]

Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 112 S. Ct. at 2136. Further, the requirement is jurisdictional and, thus, may be raised at any time. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 68 (1978).

Applying the test to the facts of this case illustrates both the constitutional grounding of the after-acquired evidence doctrine and Petitioner's lack of standing.

1. Injury

Injury, for these purposes, is the "invasion of a legally protected interest." *Northeastern Fla. Contractors*, 113 S. Ct. at 2302; *Lujan*, 112 S. Ct. at 2136.[39] Accordingly, standing initially depends on whether the right asserted by a plaintiff is one the law is prepared to recognize.[40] Not all are.

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38. Although this Court has recognized additional, prudential limitations on standing, the "core component" of the standing doctrine is "derived directly from" Article III of the Constitution, which limits the federal courts to adjudication of "Cases" and "Controversies." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

39. The injury must also be concrete, particularized, and actual or imminent. *Id.*

40. This aspect of injury-in-fact resembles but is narrower than the prudential "zone of interests" test applied in *Association of Data Processing Serv. Organiz., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

An illegal alien, for example, has no right to avoid detection and deportation, and, thus, no standing to challenge deportation procedures. *See Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1518 (D.C. Cir. 1988) (Silberman, J., writing for half of an equally divided *en banc* court); *Burrafato v. United States Dep't of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976). Likewise, an importer has no right to continued importation of a congressionally excluded product and, thus, lacks standing to challenge the exclusion. *Arjay Assocs. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989). These are cases in which, in the *Arjay* court's apt description, "appellants lack standing because the injury they assert is to a nonexistent right." *Id.*

Injury is equally lacking in cases where the plaintiff asserts a valid legal right but is disqualified from relying on it. Illustrative is a line of cases in which the Court denied standing to persons who fraudulently attempted to evade a statutory requirement and then sought to challenge the constitutionality of the requirement they had evaded. *See Bryson v. United States*, 396 U.S. 64, 68-72 (1969); *United States v. Knox*, 396 U.S. 77, 78-83 (1969); *Dennis v. United States*, 384 U.S. 855, 864-67 (1966); *Kay v. United States*, 303 U.S. 1, 6 (1938); *United States v. Kapp*, 303 U.S. 214 (1937); "[I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked." *Bryson*, 396 U.S. at 72.

In the present case, the injury Petitioner claims to have suffered is loss of employment as a result of alleged age discrimination. The question is whether Petitioner's continued employment after her misconduct is legally protected.[41] *Was*

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41. The AFL-CIO relies on *Northeastern Fla. Contractors* and *Bakke* for the proposition that there is an injury in fact merely from being subjected to a discriminatory policy and suggests that this stigmatic injury is enough to support a cause of action under the ADEA even in the absence of economic injury. (Cont'd)

Petitioner legally entitled to continued employment by the Banner? Did Congress, in passing the ADEA, intend to protect employees who have obtained or maintained their employment through fraud and deceit? If not, Petitioner has suffered no invasion of a legally protected interest and, consequently, no judicially cognizable injury.

This rationale is the basis on which Judge Godbold would have denied standing to the plaintiff in the *Wallace* case:

> I would hold that within the meaning of Title VII and the Equal Pay Act plaintiff is not a member of the affected group allegedly discriminated against and is not an "aggrieved" person. Put differently, Congress did not intend that under the circumstances of this case a plaintiff is within the protected class. Her status does not give her standing to sue. In traditional standing language she is not in the "impact area." She purports to be, but the status that would place her there was fraudulently obtained and but for her fraud would have been denied.

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(Cont'd)
Northeastern Fla. Contractors, 113 S. Ct. at 2297; *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). AFL Br. at 13-14 & n.12. *Northeastern Fla. Contractors* and *Bakke*, however, held only that the loss of opportunity to compete equally for a benefit is itself a cognizable injury. 113 S. Ct. at 2297; 438 U.S. at 265. Neither allowed standing based solely on stigmatic injury. As for the argument that the ADEA contemplates intangible injuries, the statute does not support this position, which has been rejected in the context of Title VII: "Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind." *Price Waterhouse*, 490 U.S. at 265 (O'Conner, J., concurring).

> There is no dispositive magic in the word "employee" or in having one's name on the payroll.

968 F.2d at 1187-88 (Godbold, J., dissenting).[42] Any other result imputes to Congress an intent to protect the fruits of fraud. First, it would be anomalous to allow someone whose fraud went undetected to seek damages but to disallow damages to a plaintiff in a mixed-motive case when the employer proves the same decision would have been made anyway. *See Price Waterhouse*, 490 U.S. at 242. Even though the ADEA and Title VII are separate statutes, the congressional intent to preserve the employer's right to rely on trustworthy individuals is evident. *See id.; see also* 113 Cong. Rec. 31252, 31253 (1967) (Senator Yarborough's comment

42. Judge Godbold, as did the Minnesota Court of Appeals in *Frey*, distinguished between an employee who was not qualified and who would not have been hired absent a fraudulent misrepresentation and an employee who was qualified when hired but later engaged in misconduct justifying termination. For reasons that are less than clear, both limited their standing analysis to the former. 968 F.2d at 1185; 517 N.W.2d at 598. Conceptually there is no reason to distinguish between the two situations. A person who has *maintained* a job through fraud is outside the congressional intendment just as much as someone who *obtained* a job through fraud. They are equally undeserving of congressional or judicial solicitude. It may well be harder to establish the fact and timing of discharge for post-hiring misconduct, but this just means that employers will be harder pressed to establish a valid standing objection in such cases. That is not a reason to disallow the defense to employers, such as the Banner, who are able to meet this proof and establish conclusively that the employee would have been fired anyway. *See*, discussion at I.B. *supra*.

The court in *Frey* mentioned only the possibility of employers' rummaging through employment records to find nondiscriminatory reasons for discharge as a basis for the distinction. Other than the greater potential for employee misconduct in an ongoing employment relationship, there is no apparent connection between the two. This fear is, in any event, greatly exaggerated and unpersuasive for the reasons cited by Judge Godbold. *See* 968 F.2d at 1189.

that individuals cannot "hide behind" age to stay employed if there are disciplinary reasons that disallow continued employment).

Second, although the ADEA protects actual and prospective employees in their legitimate expectations of employment, the ADEA specifically excludes individuals who by their own actions forfeit their right of employment.[43] In this respect, an employee who knowingly engages in discharge-worthy misconduct is no different than an employee who never applied or who voluntarily resigns. Such persons are simply not protected individuals under the statute and cannot properly be considered injured by the loss of their putative employment.

The AFL-CIO avoids this proposition by advocating a "functional" rather than a "normative" definition of "employee" as one who "perform[s] economically-useful [sic] work . . . and [is] paid for so doing," on grounds that such definitions are the norm in some federal legislation. (AFL Br. at 6). "[T]he question whether or not a person *is* an employee is not for legal purposes generally confused with the question whether that person is *properly* an employee." *Id.* at n.3. This argument, however, begs the question of what Congress intended with respect to the ADEA, which specifically approves good-cause discharge. *See* 29 U.S.C. § 623(f)(3).

The AFL-CIO would have the Court treat a rotten apple just like any other apple, merely because it looks like the other apples. A person who discovers a rotten apple in his cellar has the right to throw it out and owes the apple no additional consideration for the time it sat there looking for all the world like a normal apple. Even if the apple were thrown out for other reasons and only later revealed itself to have been rotten, it has no standing to complain.

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43. *See* 29 U.S.C. § 623(f)(3) (specifying that discharge for good cause is not unlawful).

Congress, we submit, did not intend to protect rotten apples. *See, e.g., Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152, 156 (5th Cir. 1962) ("an employer should not have to keep a bad apple in the barrel.")

2. Causal Connection Between the Injury and the Conduct Complained Of

The injury complained of must be one "that fairly can be traced to the challenged action of the defendant." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). In practice, this requirement has meant that the challenged conduct must be a but-for cause of the injury.[44] Although the terminology differs, the cases show consistent application of this principle. *Compare Heckler v. Mathews*, 465 U.S. 728, 741 n.9 (1984); *Duke Power Co.*, 438 U.S. at 74-78; *and Barlow v. Collins*, 397 U.S. 159, 162-63 (1970) (upholding standing where the challenged conduct was a but-for cause of the injury) *with Simon*, 426 U.S. at 45 n.25; *Warth v. Seldin*, 422 U.S. 490, 506-07 (1975); and *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973) (denying standing where the challenged conduct was not a but-for cause of the injury).[45]

Where the causal connection between conduct and injury is uncertain, the plaintiff must demonstrate a "substantial likelihood" that the conduct complained of was a but-for cause of the injury. *Duke Power*, 438 U.S. at 74, 77. *See Village of Arlington Heights v.*

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44. A but-for cause is one without which the result in question would not have occurred; it is a necessary condition, though not necessarily a sufficient one. *See, e.g., Price Waterhouse*, 490 U.S. at 283 (Kennedy, J., dissenting).

45. This is, in a sense, an unavoidable result if the concept of causation is to have any content at all. If something is not a but-for cause of an event, "then by definition it did not make a difference to the outcome. The event would have occurred just the same without it." *Price Waterhouse*, 490 U.S. at 283 (Kennedy, J., dissenting).

Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 (1977) ("substantial probability"); *Warth*, 422 U.S. at 504 ("substantial probability"). Causation is not established if the link between conduct and injury is "weak" and "speculative," subject to many intervening causes, making a but-for causal connection merely a "remote possibility." *Allen*, 468 U.S. at 757-59; *Simon*, 426 U.S. at 42-45; *Warth*, 422 U.S. at 504-07; *Linda R.S.*, 410 U.S. at 617-18 (1973).

An important corollary is that "an independent and sufficient cause in sources other than the matters complained of by the plaintiff" prevents the plaintiff from establishing the necessary causal link and, thus, defeats standing. 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.5, at 450 (2d ed. 1984). An injury is not "fairly traceable" to the defendant's conduct if it "results from the independent action of some third party." *Simon*, 426 U.S. at 41-42.[46]

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46. The plurality in *Price Waterhouse* objected to application of the but-for test of causation based on the theoretical anomaly that if an event has two independent and sufficient causes, neither is individually a but-for cause of the event. 490 U.S. at 241. This objection might have some force if both actors are negligent and liability must be assigned to at least one of them in order to vindicate the social policies of deterrence and just compensation. This problem of "overcausation" has generally been resolved in the tort context by allowing the jury to assign responsibility to any cause that was a "substantial factor" in bringing about the injury. *See generally* W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). This solution, however, is neither necessary nor justifiable where at least one of the causes is lawful and, thus, beyond the ability of the law to prevent. Where no act or omission that a court is authorized to compel could have changed the outcome, the harm was, in the eyes of the law, inevitable. In that case, the but-for test applies with full force to relieve the concurrent causal agent of liability. *See, e.g., George v. Farmers Elec. Coop., Inc.*, 715 F.2d 175, 178 (5th Cir. 1983) (wife had no standing to challenge discriminatory portion of her former employer's nepotism policy when she would have been discharged under concededly valid portion of policy).

This rule is even more applicable when the independent cause of a plaintiff's alleged injury is her own conduct. *See, e.g., Diamond v. Charles*, 476 U.S. 54, 69-70 (1986) (intervenor had no standing to challenge law allowing award of attorney's fees because it was his own decision to intervene that exposed him to liability); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (denying states standing to complain about loss of tax revenues attributable to their own laws); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir.) (R.B. Ginsburg, J.) (voluntary choice of unsafe disposal methods was not caused by lax EPA regulation of hazardous waste), *cert. denied*, 490 U.S. 1106 (1989). In each of these cases, the injury was "self-inflicted" and "so completely due to the [complainant's] own fault as to break the causal chain." *Petro-Chem Processing*, 866 F.2d at 438 (quoting 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.5, at 458 (2d ed. 1984)) (brackets in original).

The rule of independent causation has been applied to deny standing in a wide variety of circumstances.[47] The same rationale applies in the present case.

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47. *See, e.g., Woods v. Milner*, 955 F.2d 436, 439 (6th Cir. 1992) (doctors who were unqualified for permanent appointments had no standing to challenge their temporary status); *United States v. McNeal*, 900 F.2d 119, 121-22 (7th Cir. 1990) (defendant had no standing to challenge provision of sentencing guidelines when he was ineligible for reduction on other grounds); *Jones v. Cavazos*, 889 F.2d 1043, 1046-47 (11th Cir. 1989) (debtor who had no valid defense to collection action had no standing to complain about denial of due process in IRS collection efforts); *International Union, UAW v. Johnson*, 674 F.2d 1195, 1198-99 (7th Cir. 1982) (plaintiffs had no standing to challenge limits on payment of benefits for which they could not qualify); *Howard v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1099, 1101-02 (3d Cir. 1981) (plaintiffs who failed written portion of exam had no standing to challenge use of physical agility test), *cert. denied*, 458 U.S. 1122 (1982); *Carroll v. Board of Educ.*, 561 F.2d 1, 4 (6th Cir. 1977) (state had no standing to challenge constitutionality of statutes restricting federal funds to be spent on busing for desegregation where no federal

(Cont'd)

This case, like others involving after-acquired evidence, is a classic example of an injury with an independent and sufficient cause—Petitioner's misconduct—that breaks the chain of causation between the Banner's alleged discrimination and Petitioner's claimed injury. Petitioner has not disputed that she would have been discharged by the Banner immediately upon learning of her misconduct and that her discharge for that reason would have been entirely lawful. In other words, she would have been fired anyway, without regard to the Banner's alleged discrimination. Thus, the alleged discrimination is not the but-for cause of her discharge, giving her no standing to maintain her discrimination lawsuit.[48]

(Cont'd)

funds could be spent for type of busing involved), *cert. denied*, 435 U.S. 904 (1978); *Clark v. Rose*, 531 F.2d 56, 57-58 (2d Cir. 1976) (unsuccessful candidate lacked standing to challenge nominating procedure where he did not meet other criteria for nomination). *See also Planned Parenthood Ass'n v. Kempiners*, 700 F.2d 1115 (7th Cir. 1983) (majority of panel agreed that plaintiff's inability to obtain funding that was unrelated to constitutional deficiencies in funding program would preclude standing to challenge the alleged deficiencies).

48. The AFL-CIO objects that in determining causation, "the question is not what would have happened but what did happen." (AFL Br. at 9 n.7 (quoting Beale, *The Proximate Causes of an Act*, 33 Harv. L. Rev. 632, 638 (1920)). It observes that in the actual order of events Petitioner was not fired for her then-unrevealed misconduct but for allegedly discriminatory reasons. The misconduct, it argues, like the tort victim's terminal illness, is relevant to valuing the claim but not to determining causation. *Id.* at 7-9. This, of course, would make "what would have happened" relevant to the redressability element of standing in any event, but even as to causation the argument is flawed because it proceeds from a false premise. Determining causation-in-fact always requires an assessment of "what would have happened." The AFL-CIO selectively quotes Prosser's observation that causation "is a measure of what in fact happened," *Id.* at 9 n.7, but ignores a critical qualification: "*On the other hand, an act or an omission is not regarded as a cause of an event if the particular event would have occurred without it.*" W. Prosser, *Handbook of the Law of Torts* 238 (4th ed. 1971) (emphasis added). The real issue is how to define the hypothetical alternative state of affairs implied in the concept of "would have occurred." That issue is discussed in part III(A)(3) *infra* on redressability.

3. Efficacy of a Remedy Directed Solely at the Complained-of Conduct

Closely related to the causation element of the test is the requirement that the plaintiff demonstrate "a likelihood that the injury will be redressed by a favorable decision, by which we mean that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.' " *Northeastern Fla. Contractors*, 113 S. Ct. at 2302 (quoting *Allen*, 468 U.S. at 752).[49]

Because the presence of a legitimate, independent cause also precludes an effective remedy, the rule of independent causation is often applied under this prong of the standing test as well. *See, e.g., Renne v. Geary*, 111 S. Ct. 2331, 2337-38 (1991) (standing doubtful where a second, unchallenged statute likely would have produced the same result). The critical difference, for present purposes, is that redressability looks to the future rather than the past. Redressability is therefore less a metaphysical question of actual causation than a more practical problem of whether the Court can or should give a plaintiff any effective relief.

The lesson of *Renne v. Geary* is that a valid, independent, after-the-fact justification for challenged conduct can defeat standing on grounds of redressability as well as causation. *Renne*

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49. The "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated by this Court as "two facets of a single causation requirement. . . . To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested."

Allen, 468 U.S. at 753 n.19.

recognizes that the justification need not have been one that the defendant knew or relied on in taking the challenged conduct. It is enough if the justification is currently applicable and bars future relief.

As with causation, the only real issue here is when Petitioner's discharge for misconduct will be deemed to have taken place: when the misconduct was committed, when it was discovered, or when it would have been discovered absent the alleged discrimination. If her discharge for misconduct is deemed to have occurred at the time of the misconduct, the rule of independent causation precludes a finding that the alleged discrimination caused her loss of employment.[50] As with causation, however, when this implied in-law discharge occurred is not a question of historical fact but of imputation based on policy considerations.

The real issue is whether the Court is willing to give Petitioner and other plaintiffs in after-acquired evidence cases the benefit of having successfully concealed their misconduct. If as a matter of policy the Court is not, then on this record the only conclusion must be that Petitioner would have been discharged immediately after the misconduct occurred. Because the misconduct preceded the date of her actual discharge, this lawful implied discharge trumps the actual event and becomes the only legally significant discharge.[51]

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50. Conversely, if her discharge for misconduct is not deemed to be effective until after October 31, 1990, then her allegedly discriminatory discharge on that date would be the cause of her loss of employment in the interim, until the discharge for misconduct is held to be effective. Of course, to prove that her discharge was in fact discriminatory she would have to establish that the Banner's reasons were pretextual. *See St. Mary's Honor Ctr.*, 113 S. Ct. at 2752.

51. Petitioner may argue that the policies embodied in the ADEA are at least as fundamental as those served by a policy of punishing employee (Cont'd)

B. Plaintiff's Failure to Establish a Prima Facie Case Bars Relief.

As a natural outgrowth of the standing doctrine, plaintiffs must establish a prima facie case in discrimination lawsuits based on disparate treatment. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court held that part of a prima facie case of discrimination is proof that the employee or applicant was qualified for the position. *Id.* If a discrimination plaintiff cannot show that she met the criteria for the position, no recovery is possible. *See Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 823 (D.C. Cir. 1984) (FBI special agent applicant and Title VII plaintiff who could not obtain security clearance was not qualified for the job).

In a claim for discriminatory termination, a plaintiff must demonstrate that she was performing her job up to the standard of the employer's legitimate expectations. A plaintiff may have failed to meet an employer's expectations in a number of ways, including simple incompetence. *See Richmond v. Board of Regents*, 957 F.2d 595 (8th Cir. 1992) (age discrimination plaintiff whose performance was unsatisfactory over 18-month period of progressive discipline did not make out a prima facie case); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993) (gender discrimination plaintiff who continually failed to perform accurate

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(Cont'd)
misconduct. There are two answers to this argument. First, no matter how important the goals of the ADEA, they cannot override the constitutional requirements of standing. Second, it may well be that the Banner would be equally disabled from suing Petitioner to recover wages paid during the period between the dates of the time she would have been discharged and that of her actual discharge. If the parties were indeed *in pari delicto*, this result accords with the traditional rule of equity for maintaining the status quo and declining to intervene on behalf of either. *See, e.g., Securities & Exch. Comm'n v. National Sec., Inc.*, 393 U.S. 453, 464 (1969); *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Tx. R.R. Co.*, 363 U.S. 528, 532 (1960).

inventory counts, one of her primary responsibilities, did not meet her burden); *Villa v. City of Chicago*, 924 F.2d 629 (7th Cir. 1991) (national origin discrimination plaintiff was not meeting his employer's legitimate expectations because he lacked the tactfulness required in the job); *Chambers v. Wynne Sch. Dist.*, 909 F.2d 1214 (8th Cir. 1990) (teacher who applied for counselor position but lacked certification required by state law did not make out prima facie case).

Of course, employee dishonesty or other misconduct is an even stronger ground than incompetence for defeating a plaintiff's claim that she was qualified for the position. *See Williams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981). The plaintiff in *Williams h*ad obtained employment at the Library of Congress, in a position that required a law degree, by misrepresenting himself as a law student. *Id.* His deception continued during his employment when he claimed to have graduated from law school and even took a leave of absence from work on two separate occasions to, he said, study for and take a bar examination. *Id.* at 113. When Williams' deception was discovered, he was discharged. *Id.* He subsequently brought suit, alleging race discrimination under Title VII. *Id.*

The D.C. Circuit explained how *McDonnell Douglas* applied to Williams' situation:

> When the facts found by the district court and *McDonnell Douglas* are juxtaposed, it is plain that no Title VII offense has occurred here. Mr. Williams or any other Library employee . . . could simply never be entitled to, nor expect to retain, his or her job after establishing such a formidable record of lying to his employer. Trustworthiness, reliability, veracity, good judgment—these are all material

> qualifications for any job, including one as a Copyright Examiner. . . .
>
> *[Q]ualification* of the complainant is the pivotal component of the *McDonnell Douglas* prima facie case. It is clear that from the outset Williams was *not qualified* for the job which he held. . . .
>
> A second defect in Mr. Williams' prima facie case can be characterized as *disqualification.* The lying itself, also from the outset, made him an unfit employee of the Library of Congress, wholly apart from the question of his not being a lawyer or his serving well in appointed tasks. . . . Under all the admitted circumstances, we think it virtually impossible for the Librarian to have acted other than to discharge Williams.

Id. at 117-18.

The court's further comments indicate that Williams' conduct waived his employment status: "Williams was not a *victim* at all. He was the responsible agent in his own termination, 'generat[ing] his own fate' by choosing an unlawful route to employment opportunity." *Id.* at 119 (brackets in original).[52]

The applicability of the court's analysis of the plaintiff's lack of qualification in *Williams* to the present case is obvious. Even if discovered after Petitioner's discharge, Petitioner was not qualified for the job she held. Her misconduct "disqualified" her at the time

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52. The parallel between this explanation and the rule of independent causation requires no explanation. *See Petro-Chem Processing*, 855 F.2d at 438.

she betrayed her trust. She was, objectively, an unfit employee. *See Williams,* 663 F.2d at 117-18 ("[t]rustworthiness, reliability, veracity, good judgment . . . are all material qualifications for any job . . . .").[53]

Although expressing denial of relief in terms of qualifications, the court in *Summers* read *McDonnell Douglas* to presuppose dismissal grounds known to the employer at the time of discharge. *Summers,* 864 F.2d at 705. Regardless of this presupposition in *Summers,* several cases have adopted the doctrine announced in *Summers* by relying on the *McDonnell Douglas* test. *See Gilty v. Village of Oak Park,* 919 F.2d 1247, 1251 (7th Cir. 1990) (plaintiff who lied on application not qualified even though his employer did not know about lies at time of adverse employment decision).

The plaintiff in *Gilty* argued that, because his employer did not know about his lies, the information should not affect his discrimination claim. *Id.* at 1251. Rejecting this argument as "specious," the court held:

> *[T]he determination of whether a plaintiff is "qualified" requires an objective analysis. As*

53. A number of other cases construing the qualification prong of *McDonnell Douglas* have reached similar conclusions. *See, e.g., Smallwood v. United Air Lines, Inc.,* 728 F.2d 614, 626 (4th Cir.), *cert. denied,* 469 U.S. 832 (1984) (ADEA plaintiff not qualified to work as airline pilot because, in prior job, he falsified address to receive moving expenses and used company card to buy plane tickets for his children in violation of company policy); *Avant v. South Cent. Bell Tel. Co.,* 716 F.2d 1083 (5th Cir. 1983) (falsification of application in failure to reveal prior larceny conviction shows Title VII plaintiff was not qualified); *Robinson v. United States Air Force,* 635 F. Supp. 108, 111-12 (D.D.C. 1986) (Title VII plaintiff's falsification of educational degree on application, known at time of discharge, justified termination, and after-acquired evidence of falsification of employment experience showed plaintiff not qualified because "nature and extent of the false information . . . raise serious questions concerning his good judgment, truthfulness and reliability and basic qualifications. . . .").

> *such, an employer's knowledge or lack of knowledge is of no relevance at the prima facie stage of the case. . . .* Under an objective standard, *Gilty simply cannot meet the quasi-standing elements set out in McDonnell Douglas.* He does not argue, nor does case law support, the notion that "qualified" law enforcement officers need not be "truthful" law enforcement officers. . . . [T]he point is not that Gilty needed, but did not have, a bachelor's degree or a master's degree. The point is that he lied.

Id. (citations omitted and emphasis added).[54]

Application of the logic of the foregoing to the present case compels the conclusion that Petitioner failed to make out a prima facie case based on her disqualification to be a confidential secretary. Put simply, Petitioner came to court seeking relief under the ADEA when, in fact, she never passed and could never pass the threshold prima-facie requirement that she was qualified to be a confidential secretary.[55] Moreover, because the prima-facie

54. *Dotson v. United States Postal Serv.,* 977 F.2d 976, 978 (6th Cir.), *cert. denied,* 113 S. Ct. 263 (1992). ("Even though plaintiff's failure to complete the application truthfully was discovered post-termination, he is not entitled to handicap discrimination relief when he was not initially qualified for the position."); *Guzman v. United Airlines,* 53 Fair Empl. Prac. Cas. (BNA) 1419 (D. Mass. 1990) (national origin discrimination plaintiff failed to disclose prior back injury in application and, therefore, failed to show he was qualified for employment).

55. The EEOC concedes that an employee's qualification is essential for any remedy: "[a] properly tailored backpay remedy is then *almost always* appropriate relief for the discriminatory discharge of *an employee qualified for the position she held.*" (EEOC Br. at 21 (emphasis added)).

showing by Petitioner, or any discrimination plaintiff, is the minimum requisite to establish her standing, *see Gilty*, 919 F.2d at 1250, Petitioner is constitutionally barred from maintaining her lawsuit. Accordingly, she is barred from the relief she seeks as a matter of constitutional law and of this Court's incorporation of the standing principle in *McDonnell Douglas*.

C. The Doctrine of Unclean Hands Applies to Bar Relief.

The equitable doctrine of "unclean hands" demands that "[one] who seeks equity must do equity." *Manufacturer's Fin. Co. v. McKey*, 294 U.S. 442, 449 (1935). "[C]onsiderations that make for the advancement of right and justice" properly prevent an unclean litigant from unjustly profiting from misconduct. *See Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933). The unclean hands doctrine "closes the door" to a plaintiff tainted by "inequitableness or bad faith relative to the matter in which" relief is sought. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945), *quoted in ABF Freight Sys. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring). A plaintiff need not have lived a "blameless" life but must be without "fraud or deceit" in the matter being litigated. *Id.* The door is closed to a tainted plaintiff, "however improper may have been the behavior of the defendant." *Id.*

Petitioner was properly denied all relief because she came seeking equitable remedies when the undisputed evidence established that, in fact, her own hands were unclean.[56] The application of the unclean-hands doctrine is especially justified when the wrongful conduct is a material and serious fraudulent act or grave breach of good faith, such as Petitioner's. *See Deweese v. Reinhard*, 165 U.S. 386, 390 (1897).

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56. In the instant case, Petitioner seeks equitable relief for alleged discriminatory conduct in the form of backpay. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1490 (1994) (backpay consistently viewed as an "equitable" remedy).

An "unclean" employee's misconduct sufficient to demand termination warrants a bar of relief under the unclean hands doctrine because the equity that the plaintiff seeks in the litigation is necessarily and immediately related to the employee's misconduct. *Keystone Drilling Co. v. General Excavation Co.*, 290 U.S. 240, 245 (1933).

It is undisputed that the Banner would fire a "confidential" secretary who was not faithfully discreet in that position of trust. Further, as Petitioner admitted, any reasonable employer would view Petitioner's misconduct to be the very antithesis of the conduct justifiably expected from a confidential secretary and would consider the misconduct a dischargeable offense. Thus, Petitioner's misconduct is immediately and necessarily related to the equitable remedies that she seeks for her discharge.

Petitioner begs this Court to allow her to pursue a claim for backpay and damages, conveniently ignoring the fact that she defrauded her employer not just once but twice. First, she betrayed her employer's trust. Second, she reaped undeserved rewards in the form of salary and benefits that she would otherwise not have received but for her stealth.[57] Because Petitioner enjoyed undeserved continued employment and accepted paychecks during the time that she practiced her deception, she was properly denied any relief.[58] To allow her to seek any remedy now would,

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57. It is undisputed that had she not covered up her theft, she would have been fired in the summer or fall of 1989, when she began the copying and theft. (*See* II P.Dep. at 227, 230-33).

58. Courts have generally recognized the unclean hands doctrine as a sufficient basis to bar relief in discrimination cases. *Anderson v. Savage Lab., Inc.*, 675 F.2d 1221, 1223 (11th Cir. 1982); *Woods v. Ficker*, 768 F. Supp. 793, 802 (N.D. Ala. 1991), *aff'd without op.*, 972 F.2d 1350 (11th Cir. 1992); *Women Employed v. Rinella & Rinella*, 468 F. Supp. 1123, 1129 (N.D. Ill. 1979); *see Hargett v. Delta Automotive, Inc.*, 765 F. Supp. 1487, 1489 (N.D. Ala. 1991).

therefore, not only give Petitioner the windfall of receiving these wages after her betrayal and the windfall of any additional remedy but would also further penalize the Banner for trusting her. Equity will not allow this result.[59]

IV.

THE ARGUMENTS AND AUTHORITIES OF PETITIONER AND HER AMICI ARE INAPPLICABLE TO THE PRESENT CASE.

Although the doctrine has its genesis in established legal and equitable principles, Petitioner and her amici argue that the doctrine somehow shakes the foundations of established law. As the following shows, Petitioner's argument relies on flawed logic, weak arguments, and inapposite authorities. Neither her arguments nor her authorities can withstand scrutiny.

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59. However, if the Court decides that the doctrine should not bar all relief, any permissible relief should be limited. Petitioner herself concedes that damages should be limited in a case such as this where the employer meets its burden of proving that it would have discharged Petitioner had it been aware of the misconduct. (P.Br. at 50).Assuming, arguendo, that this Court decides that even wrongdoers should be entitled to some relief, that relief should be limited to injunctive relief and pro rata fees. This limitation does the least violence to the policy arguments that focus on a balancing of the statutory interests of both employees and employers. Thus, where an employer meets the three-part test articulated above, an employee should not be given an additional windfall of backpay or other damages where that employee has wrongfully benefitted from continued employment and compensation. This balance is at least consistent with the congressional mandate in the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B), which disallows reinstatement and damages, allowing only declaratory, injunctive relief and attorney's fees in mixed-motive cases. If, as a matter of policy, this Court decides that some relief is appropriate despite the employee's wrongdoing then this limited relief, at most, would strike an appropriate balance.

One of Petitioner's amici argues the rejection of the *in pari delicto* or "unclean hands" defense in litigation involving alleged discriminatory conduct by relying on cases construing the securities and antitrust statutes. (NELA Br. at 4). Such an argument improperly compares apples with oranges by ignoring the legislative history of the ADEA and departing from clearly accepted judicial application.[60]

The ADEA grew out of a study by the Secretary of Labor, *The Older American Worker-Age Discrimination in Employment. See e.g.* H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213. The resulting report concluded that, contrary to other types of employment restrictions, it would be "futile as public policy, and even contrary to public interest, to conceive of all age restrictions as 'arbitrary'. . . ." *U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964* 21 (1965). Accordingly, Congress specifically approved three situations, including discharge for good-cause, where the ADEA would not prohibit an employer from either restricting or discharging an employee despite her age. 29 U.S.C. § 623(f)(1-3). Here, but for Petitioner's deception, just such a "good cause" discharge would have occurred. The unclean hands doctrine as applied to this case preserves the statutory policy of allowing good-cause discharges: such good-cause discharges should not be frustrated by the deception of the employee who invokes that very statute. Such a conclusion is compelled by the legislative history of

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60. Even comparisons of Title VII and prior labor acts such as the NLRA and the Fair Labor Standards Act ("FLSA"), although more logically and substantively related than the comparison attempted by Petitioner, "must necessarily be guarded because the differences between those Acts and Title VII may well outnumber the similarities." *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.19 (5th Cir. 1969)("entirely different proceeding under an Act with an entirely different purpose and before an agency with an entirely different function"). *See also* note 36 *supra*.

the ADEA[61] and is evident in the consistent judicial application of the doctrine in cases of alleged discriminatory conduct.[62]

Petitioner argues that the doctrine should be rejected in the context of employment discrimination because other federal statutes have been construed to discount after-discovered misconduct. Petitioner's reliance on the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 38 U.S.C. § 901 *et seq.*, and the Jones Act, 46 U.S.C. § 688, in support of this argument is completely misplaced. These statutes are compensatory in nature, intended to extend benefits similar to those found under state workers' compensation statutes.[63] These laws do

61. Petitioner argues from the premise that the ADEA was designed to seek out and punish employers that discriminate based on age. In reality, because the ADEA is premised on a desire to make any victims of such discrimination whole, the statute is an equitable-remedy statute, not a penal provision.

62. Petitioner's Amici argue that only "[a] few courts have allowed" such a defense "without much analysis." (NELA Br. at 4 n.1). This conclusion, is not warranted by the cases cited in support of it. *See Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993)(otherwise valid, unclean hands defense rejected because plaintiff's false claim of college degree irrelevant to wage discrimination claim as neither her predecessor nor her successor had college degrees); *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991)(rejection of defense as the misconduct was perpetrated by government agency rather than plaintiff, who was clearly "innocent" of any wrongdoing); *Hargett*, 765 F. Supp. 1487 (N.D Ala. 1991) (although rejecting unclean hands defense *only* on the facts of the case, clearly recognizes defense as otherwise "inevitably available" and a "classic principle of equity jurisprudence"); *Woods*, 768 F. Supp. 793 (unclean hands defense "available in all equity cases," and a "serious defense [that] must be examined"), *aff'd without op.*, 972 F.2d 1350 (11th Cir. 1992).

63. *See Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 507-08 (1957); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 604 (1981); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 546-47 (1960).

not focus on the employee's negligence or misconduct.[64] These laws are in a class designed to compensate employees for on-the-job personal injuries that are palpable and tangible. As such, this class of laws is conceptually different from the class of laws that combats discrimination, including the ADEA. In the compensatory laws, an injured employee must make only a minimum showing that an employer's negligence led to the employee's injury. In contrast, the ADEA and other discrimination laws require that the employee carry a burden of proving both injury and intent to injure on the part of the employer. *See St. Mary's Honor Ctr.*, 113 S. Ct. at 2752. Accordingly, neither the federal compensatory statutes nor the cases construing them are persuasive authority in this matter.

Petitioner's reliance on *Still v. Norfolk & W. Ry.*, 368 U.S. 35 (1961), is misplaced because Petitioner ignores significant distinctions between the issues at stake in *Still* and those of the present case. *Still* is limited to the proposition that an injured railroad worker specifically protected by the FELA was an "employee" despite the fact that he had gained employment by fraud. *Id.* at 45.[65] Further, the decisions following *Still* have

64. This concept is demonstrated in statutory provisions and decisions limiting the availability of fault-based defenses in connection with statutory recovery. *See* 45 U.S.C. § 54 (FELA), 33 U.S.C. § 904(b) (LHWCA), *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1938) (assumption of risk not a defense under Jones Act); *Bobb v. Modern Prods., Inc.*, 648 F.2d 1051, 1056 (5th Cir. 1981) ("The law is well-settled that contributory negligence by the plaintiff will not defeat a seaman's claim under the Jones Act, but may be considered as comparative negligence to mitigate the damages. . . .").

65. The Court in *Still* distinguished its holding from that in *Minneapolis, St. Paul & S. Ste. Marie R. Co. v. Rock*, 279 U.S. 410 (1929), where the plaintiff was held not to be an employee because he had been previously denied employment for health reasons, had reapplied under a false name, and had another person impersonate him for the physical exam. The Court stated that, *inter alia*, the plaintiff in *Rock* was an "imposter." *Still*, 368 U.S. at 40. Here, Petitioner's breach of confidentiality while posing as a "confidential" secretary makes her just such an "imposter."

involved job application misrepresentation and either railroad or maritime carrier negligence. *See Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986 (9th Cir. 1987); *Gypsum Carrier, Inc. v. Handelsman Maritime Carrier,* 307 F.2d 525 (9th Cir. 1962); *Reed v. Iowa Marine & Repair Corp.*, 143 F.R.D. 648 (E.D. La. 1992); *Spinks v. United States Lines Co.*, 223 F. Supp. 371 (S.D.N.Y. 1963).

Petitioner's reliance on the FLSA to support this argument, while better grounded than her use of the compensation statutes, is also misplaced. The legislative history of the ADEA demonstrates that not all of the provisions of FLSA were adopted into the ADEA. In addition, Petitioner's discussion of *Goldberg* to support her argument is misleading. *Goldberg* is not a "definitive" after-acquired evidence case. While certain of the plaintiff's misdeeds in that case were discovered after her termination from employment, *most were already known to management before her discharge.* Because management continued to employ her despite these incidents and because a retaliatory discharge *had been proved,* the court found her misconduct could be used only to lessen her award, not to deny relief altogether. 302 F.2d at 156. In contrast, the present case presents no facts leading to even an inference of retaliation or any other forms of discrimination, and it is undisputed that the Banner never waived its right to discharge Petitioner.

Finally, the obvious inapplicability of *Still* and *Goldberg* to the present case is best underscored by the fact that the after-acquired evidence cases do not rely on either *Still* or *Goldberg*. The lower courts have not considered these cases applicable authorities, and this Court should reject Petitioner's effort to muddy the issue here by relying on them.

V.

SUMMARY JUDGMENT IS AN APPROPRIATE MEANS OF DISPOSING OF AFTER-ACQUIRED EVIDENCE CASES, ESPECIALLY THE PRESENT CASE.

Since 1986, a trilogy of cases[66] established that summary judgment is often an efficient procedure to avoid unnecessary trials on insufficient claims. W. Schwarzer, A. Hirsch, D. Barrans, *The Analysis and Decision of Summary Judgment Motions,* 139 F.R.D. 441 (1991). In general, these cases clarified that the moving party does not have to disprove the non-moving party's case. *Id.* at 451. When summary judgment is properly used, the procedure conserves time and resources of both the courts and the parties. *Id.*

"Only disputes over facts that might affect the outcome of the suit" will preclude summary judgment. *Anderson,* 477 U.S. at 248. Once the moving party shows that the non-moving party lacks proof to establish a requisite element of its case to survive summary judgment, the non-moving party must come forward with " 'specific facts showing that there is a genuine issue for trial.' " *Matsushita,* 475 U.S. at 586-87 (citation omitted).

All of the elements entitling the Banner to summary judgment are present here. Petitioner had adequate time to conduct full discovery. After serving interrogatories and document requests and receiving timely responses, Petitioner sought and was granted leave to complete additional depositions to rebut the Banner's motion. Both before and after the extension of time, Petitioner deposed four of the Banner's principals.

Notwithstanding ample time to discover controverting facts

66. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

and any pretext on the part of the Banner, Petitioner found none. For example, Petitioner made no showing that the Banner fabricated evidence against her or that it treated her differently from other employees, including the other eight employees who were part of the reduction in force.

The undisputed facts establish unequivocally that Petitioner's misconduct was directly related to her status as a confidential secretary. By stealing confidential, sensitive information and sharing it with unauthorized persons outside the workplace, Petitioner's actions constituted an egregious breach of her duty. It was equally clear and undisputed that Petitioner would have been terminated had the Banner discovered her theft while she was employed as confidential secretary to the Comptroller. All of the Banner's principals testified under oath, both in affidavits and in depositions under cross examination, to this fact. Finally, of course, Petitioner admitted that she would have been fired if she had been caught. Thus, as a matter of law, the undisputed facts established adequate and just cause for her dismissal even though the Banner was unaware of her theft until after she sued.[67] Where the facts are undisputed, the moving party fully meets its burden, and the non-moving party has not even a scintilla of evidence to rebut the moving party's proof[68] or to show pretext, summary judgment is proper.

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67. In contrast to some cases denying summary judgment, the facts of the present case do not raise any doubt about the nature and materiality of the misconduct or about the Banner's actions in response. *Cf. Kristufek*, 985 F.2d at 370 (resume falsification about education not critical job requirement, and employer failed to prove it would have fired the plaintiff); *Welch*, 23 F. 3d 1403 (single affidavit insufficient to meet employer's burden of proving it would have fired the plaintiff); *Mardell*, 1994 WL 396512 (direct evidence of sex and age discrimination, minor or non-material resume misrepresentations, and single affidavit require trial).

68. Petitioner's assertions (P.Br. at 43) that the district court (Cont'd)

Just recently, the Court clarified the evidentiary formula for proving pretext: "A reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false *and* that discrimination was the real reason." *St. Mary's Honor Ctr.*, 113 S. Ct. at 2752. Petitioner has produced no evidence of pretext. This case presents no evidence that the Banner rummaged through her employment records to discover some error or omission, however trivial or minor. Rather, the undisputed material facts here are that the misconduct admittedly justified discharge, that discharge was objectively reasonable, and that the Banner would have discharged her had the misconduct come to light.[69] Thus, summary judgment in favor of the Banner was proper. *See Matsushita*, 475 U.S. at 586-87. To put the parties and judicial system to the expense of a trial when the outcome is inevitable would be an exercise in futility.

(Cont'd)

misunderstood the burden of proof in ruling on the Banner's Motion are wrong. The quoted language in the district court's analysis focused on Petitioner's inability to rebut the Banner's proof that she would in fact have been fired. However, prior to reaching that point in the analysis, the district court properly found that the Banner had fully met its burden on this issue.

69. Although only for purposes of summary judgment, the Banner assumed that Petitioner was subject to discriminatory discharge, she has adduced no evidence of discrimination.

CONCLUSION

As the foregoing shows, the doctrine of after-acquired evidence of wrongdoing is fully consistent with the policies underlying the ADEA, as well as other antidiscrimination statutes, and has its genesis in established legal and equitable principles. The material and undisputed facts of the present case compel application of the doctrine to deny Petitioner a trial. Summary judgment for the employer is proper where, as here, all of the elements of the three-part test, including both objective and subjective unrebutted proof by the employer, are met. Accordingly, Petitioner in this case was properly denied any relief.

Respectfully submitted,

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